No. 91-1589

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GEORGE SWAMP, JOHN HENDRICK, and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Petitioners,

vs.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, PETER R. DOHR and THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May a state, consistent with the First and Fourteenth Amendments to the United States Constitution, forbid a minor party to nominate a candidate for public office merely because that candidate is also the nominee of another political party?

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Petitioners,

vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

George Swamp, John Hendrick, and Labor-Farm Party/Partido Laborista-Agrario (collectively "petitioners" or "Labor Farm") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 950 F.2d 383 and appears as Appendix A ("App. A") to this petition. The opinion of the District Court for the Western District of Wisconsin, dismissing the lawsuit, is unreported and appears as Appendix B ("App. B"). The Court of Appeals' order denying petitioners' suggestion for rehearing *en banc*, and the written dissent to that order by Judge Ripple, joined by Judges Posner, and Easterbrook, are also unreported and appear as Appendix C ("App. C").

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 3, 1991. On February 11, 1992, three judges dissenting, the court of appeals denied petitioners' suggestion for rehearing *en banc*. Justice Stevens of this Court granted an extension of time for the filing of this petition to April 1, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and Wisconsin Statutes, §§ 8.15(7) and 8.03(1). Relevant portions of these constitutional provisions and statutes appear at Appendix D.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners ("Labor Farm") are a minor political party and two of its members. Labor Farm runs candidates for local and statewide office in Wisconsin. It has demonstrated sufficient voter support to qualify, along with the Republican and Democratic parties, as one of three "recognized" or "ballot status" parties in that state, with a line on statewide election ballots designated in its name (R6, Ex. A, ¶¶ 2-3).[1]

Labor Farm challenges the constitutionality of Wisconsin's blanket ban on "multiple party nomination" ("MPN"), or the nomination of a single candidate, in the same election and for the same office, by more than one party. In an MPN system, a candidate nominated by two political parties appears in the general election on the ballot lines of both parties, and votes cast for that candidate on either line are aggregated in determining support relative to rivals. MPN was once widely practiced in the United States, but was banned in most states after the defeat of the Populists in the mid-1890s.[2] The practice survives today in only a few states, most prominently in New York.[3] MPN is

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1. R6 refers to Docket Entry No. 6 in the record on appeal, R1, R2 etc. to Docket Entries Nos. 1, 2, etc.

2. Peter C. Argersinger, *A Place on the Ballot; Fusion Politics and Antifusion Law*, 85 American Historical Review 287 (1980).

3. Multiple nomination by political parties is permitted, either by explicit authorizing statute or the absence of a ban, in Arkansas (no ban); Connecticut (Conn. Gen. Stat. § 9-453t [1991]; Delaware (no ban); Mississippi (no ban); New York (N.Y. Election Law §§ 6-120, 146 [McKinney 1978 & Supp. 1992]); South Dakota (no ban); Utah (no ban); and Vermont, where MPN is permitted

(Cont'd)

favorable to minor parties; its widespread ban was a deliberate, and largely successful, effort to reduce the influence of minor parties in the United States.[4]

(Cont'd)
by minor party committees but not major parties in primary (Vt. Stat. Ann. tit. 17, § 2474 [Supp. 1991]).

States that explicitly ban MPN include Alabama (Ala. Code § 17-8-2 [1975]); Georgia (Ga. Code Ann. § 21-2-137 [Michie 1987]); Hawaii (Haw. Rev. Stat. § 12-3([c] [1988]); Illinois (Ill. Ann. Stat. ch. 46, ¶ 7-10[2] [Smith Hurd 1991]); Indiana (Ind. Code Ann. §§ 3-8-7-19, -20 [Burns Supp. 1991]); Iowa (Iowa Code Ann. §§ 49.37, .38 [West 1991]); Kansas (Kan. Stat. Ann. § 25-306 [1986]); Kentucky (Ky. Rev. Stat. Ann. § 118.405 [Michie/Bobbs-Merrill Supp. 1990]); Michigan (Mich. Comp. Laws Ann. § 168.692 [West 1989]); Minnesota (Minn. Stat. Ann. § 202A.23 [West Supp. 1992]); Missouri (Mo. Ann. Stat. § 115.351 [Vernon 1980]); Montana (Mont. Code Ann. § 13-10-303 [1989]); Nebraska (Neb. Rev. Stat. § 32-516 [1943]); New Jersey (N.J. Stat. Ann. § 19:13-8 [West 1989]); North Dakota (N.D. Cent. Code § 16.1-12-06 [1991]); Pennsylvania, except for certain municipal elections (Pa. Stat. Ann. tit. 25, § 2870 [Supp. 1991]); Rhode Island (R.I. Gen. Laws § 17-15-7 [1988]); Tennessee (Tenn. Code Ann. § 2-5-101[f][1] [Supp. 1991]); Virginia (Va. Code Ann. § 24.1-111 [Michie 1950]); and Washington (Wash. Rev. Code Ann. § 29.30.101 [West Supp. 1992]). This list includes states in which MPN ballots are banned, but write-ins are permitted.

Other states effectively prohibit MPN without directly banning it, including Alaska (Alaska Stat. §§ 15.25.030, .180 [1988]); Arizona (Ariz. Rev. Stat. Ann. §§ 16-311, -341 [1984]); Colorado (Colo. Rev. Stat. Ann. §§ 1-4-101, -102, -601, -603, -801[1][i] [West 1989]); District of Columbia (D.C. Code Ann. § 1-1312[i]-[j] [1981]); Florida (Fla. Stat. Ch. 99.021[1][b] [1991]); Idaho (Idaho Code § 34-704 [1981]); Louisiana (La. Rev. Stat. Ann. 18:463, 465 [West 1979 & Supp. 1992]); Maryland (Md. Election Code Ann. §§ 4A-1, 16-5[d] [1990]); Massachusetts (Mass. Ann. Laws ch. 53, §§ 48, 61 [Law. Co-op Supp. 1991]); Nevada (Nev. Rev. Stat. § 293.177 [1990]); New Hampshire (N.H. Rev. Stat. Ann. § 655.14 [1986]); North Carolina (N.C. Gen. Stat. § 163-106 [1991]); Ohio Rev. Code Ann. § 3513.05 [Anderson 1991 Supp.]); Oklahoma (Okla. Stat. Ann. tit. 26 § 5-105 [West 1991]); and Wyoming (Wyo. Stat. §§ 22-5-204 [1977]).

4. *Argersinger, supra* n. 2, at 288 ff.; R14, Reply Ex. C, ¶¶ 9-10, 13.

This case arose in July 1990, when Labor Farm sought to nominate, with his consent (R12, Affidavit, ¶ 4), Douglas La Follette as a Labor Farm candidate for the office of Wisconsin Secretary of State (R6, Ex. B). At the time, La Follette was already seeking the Democratic Party nomination to that office. Acting pursuant to Wisconsin's MPN-ban, the State Board of Elections ("the State") refused to place La Follette on Labor Farm's primary ballot, triggering the present challenge[5] (R6, Ex. C).

B. History of the Litigation

Labor Farm brought this action in district court on July 13, 1990.[6] It sued the State for injunctive and declaratory relief, arguing that the Wisconsin MPN-ban violated the First and Fourteenth Amendments by impermissibly burdening its rights (1) to freely choose its nominees and (2) to compete, as a minor

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5. The Wisconsin ban states:

> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.

Wis. Stat. Ann. § 8.15(7) (West 1986). Section 8.03(1) provides:

> The name of any candidate who is nominated to the same office by more than one party or primary . . . shall appear under the party first nominating him or her or under the office to which he or she was first nominated.

Since La Follette's nomination in the Democratic primary was filed before Labor Farm's, the Board placed La Follette on the Democratic party's ballot line, and excluded him from Labor Farm's line (R6, Ex. C).

6. Jurisdiction in the district court was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

party, in an electoral process not disproportionately burdensome to minor parties.

The first prong of Labor Farm's argument was based on that line of cases, culminating in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) and *Eu v. San Franciso County Democratic Central Committee*, 489 U.S. 214 (1989), holding that political parties have fundamental rights under the First Amendment to regulate their own affairs — including the right to select candidates to represent them in elections — free of interference by the state. Labor Farm argued that the MPN-ban infringes this right on its face. By barring the party from nominating individuals already nominated by, or seeking the nomination of, another party, it burdens a political party's basic right to choose the standard bearer of its choice.

The second prong of Labor Farm's argument was based on that line of cases, culminating in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), holding that state electoral laws which impose a disproportionate burden on new or minor parties infringe fundamental First Amendment rights. America has a "winner take all" electoral system, in which office-seekers are typically elected by a simple plurality of votes cast in single member election districts. In such a system, minor parties, which are typically unable to win elections on their own, suffer from a "wasted vote syndrome". Many who support a minor party's ideology and program decline to demonstrate that support at the polls, since they are reluctant to "waste" votes on candidates with no serious chance of winning. MPN mitigates this syndrome by permitting minor parties to join electoral coalitions with other parties behind candidates with a realistic chance of success. It gives minor party supporters an opportunity to express their support without "wasting" their votes. The undisputed result is that minor parties do better under MPN than under an MPN-ban (R14, Reply Ex. C, ¶¶ 5-6, 13). Labor Farm argued, on the basis of these facts,

that the Wisconsin MPN-ban is just the sort of state law, facially neutral but in fact disproportionately burdensome to minor parties, that was held unconstitutional under *Anderson*.

The district court denied Labor Farm's request for an injunction and dismissed the lawsuit. The court found that the MPN-ban imposed no burden on Labor Farm's First Amendment freedoms (App. B at 17a-18a) and was in any case justified by the State's interests in avoiding confusion and assuring that the "winner is the winner," *i.e.*, that the winner of any election is the choice of a majority or at least plurality of those participating in that election (*Id.* at 18a).

Labor Farm appealed this decision and sought injunctive relief pending appeal. The request for an injunction was denied, and on December 3, 1991, the court of appeals affirmed.

Writing for the majority, Judge Kanne, joined by Judge Manion, first found that the MPN-ban imposed no burden on Labor Farm's First Amendment freedoms because the party remained free to nominate candidates other than its preferred one, and free to support its preferred candidate in the primary of another party [7] (App. A at 4a, 5a). Without mentioning that La Follette had *consented* to be Labor Farm's nominee, the majority declared that the MPN-ban did not infringe a party's right to "nominate any candidate that the party can convince to be *its* candidate." (*Id.* at 4a).

The majority held further that Wisconsin's MPN-ban was justified by the State's interests in assuring that "the winner is

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7. In Wisconsin, split-ticket voting is not permitted in party primaries. Wis. Stat. Ann. § 5.62(5) (West 1986). A voter's decision to support La Follette on the Democratic Party's primary line would thus entail not voting for any Labor Farm candidates.

the winner," in avoiding voter confusion, and in preserving the integrity of the election process through avoidance of party raiding and the involuntary nomination of candidates by extremists (*Id.* at 5a-7a).

In a separate concurrence, Senior Judge Fairchild took issue with the majority's reasoning. Apparently recognizing a burden on Labor Farm's First Amendment rights (*Id.* at 8a-9a), he rejected, as inadequate, irrelevant, or overbroad, all the state interests relied on by the majority to justify the ban (*Id.* at 9a-10a). Judge Fairchild nevertheless argued that the ban should be upheld, on the grounds that it might be thought to contribute to the distinctness of political party platforms and ideologies, and that such distinctness might be considered one aspect of a stable political system (*Id.* at 10a-12a).

On December 26, 1991, Labor Farm filed a suggestion for a rehearing *en banc*. During the pendency of that suggestion, this Court decided *Norman v. Reed*, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992). Labor Farm brought the *Norman* decision to the attention of the court of appeals and sought leave to file a supplemental brief on its relevance to this case. Leave was denied, and on February 11, 1992, the majority of the court denied rehearing without opinion. Judge Ripple, joined by Judges Posner and Easterbrook, filed a written dissent (App. C).

Judge Ripple's dissent sharply criticized the panel's treatment of this case, observing that it "deviates in important respects from the methodology and analysis employed by the Supreme Court." (App. C at 22a). The dissent found that the Wisconsin ban infringes core freedoms, rejected as inadequate the state interests offered in the ban's defense, and concluded that Wisconsin has no "right to frustrate freely made political alliances simply to protect artificially the political status quo." (App. C at 23a-24a).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS CONSTITUTIONAL ISSUES OF GREAT PUBLIC IMPORTANCE.

This case presents two constitutional issues of great public importance. Both, given the extent of MPN-bans in the United States, are of national scope.

The first issue is whether a state can legitimately forbid a political party from nominating the candidate of its choice. No right is more important to the associational activities of political parties than their right to select the candidates who they believe best advance their political views. Wisconsin's MPN-ban tells Labor Farm whom it can nominate. It is difficult to imagine a more intrusive restriction on a political party's associational rights.

The second issue is whether the existing major parties, exercising their *de facto* monopoly on state legislative power, may erect artificial barriers to competition from new and minor parties. The historical record makes clear that MPN-bans weigh disproportionately on minor parties and were enacted with the explicit purpose of limiting competition from them. If, as here, the electoral alliances that MPN permits are freely made, the *only* rationale for restricting them is "to protect . . . the political status quo." (App. C at 24a).

MPN-bans, whose first enactment substantially predates this Court's present recognition of the constitutional importance of the rights of political parties, have never been reviewed by this Court. This case presents the Court with an opportunity to review this important feature of American electoral law in light of present constitutional understandings.

II.

THE PANEL FAILED TO EVALUATE THIS CASE BY THE STANDARDS REQUIRED BY THIS COURT.

This Court has declared that political party challenges to state laws restricting party autonomy or burdening the growth of minor parties require exacting review. *Eu*, 489 U.S. at 222; *Anderson*, 460 U.S. at 789. In determining if a challenged law imposes a burden on fundamental party rights or a significant restriction on minor parties, an "indepth examination of the associational rights at issue" is demanded (App. C at 22a), and a statute found to impose such a burden can survive challenge only if the court finds it to be "narrowly drawn to advance a state interest of compelling importance." *Norman*, 112 S. Ct. at 705 . The panel fails to conduct either part of this searching inquiry (App. C at 22a).

First, the majority's finding that Wisconsin's MPN-ban places *no* burden on labor farm's associative freedoms is perfunctory, and ignores important precedents of this Court.

This Court has explicitly recognized that a political party's right to nominate a candidate of its choice is a core right, interference with which "unquestionably implicates an associational freedom." *Eu*, 489 U.S. at 224; *Tashjian*, 479 U.S. at 214-6. The dissent correctly observes that the "ability to choose the same person as another party is an important aspect of that right" (App. C at 22a). On its face, Wisconsin's MPN-ban burdens this fundamental right.

This Court has also recognized that a restriction on electoral activity that "falls unequally on new or small political parties . . . impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. at

793-4. It is beyond controversy that the MPN-ban hurts minor parties more than major ones, and hurts them severely. Under *Anderson* and *Norman*, it thus imposes a *substantial* burden on First Amendment freedoms.[8]

Second, given the magnitude of these burdens, the interests asserted by the panel do not justify the ban. They are manifestly not compelling state interests narrowly advanced by the challenged statute.

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8. The majority appears to regard the rights of minor parties, including their right to advance their interests in the electoral system, as themselves illegitimate. Such an attitude may explain the majority's speculation that Labor Farm's "true motivation" might be to maintain its ballot status, as if such ambition were itself illegitimate (App. A at 5a, n. 3). And it may explain the majority's characterization of inter-party alliances initiated by minor parties as efforts to "*leech* onto" those more powerful than themselves (*Id.* at 5a). Judge Ripple squarely refutes this characterization in the dissent:

> When a party nominates a candidate also nominated by a major party, it does not necessarily "leech onto" . . . the larger party for support. Rather, it may — and often does — offer the voters a very real and important choice and sends an important message to the candidate. If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party . . . Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor. In short, permitting people to vote for a candidate on one party line rather than another increases the opportunity of both voter and party to be heard and for workable political alliances to be formed.

(App. C at 22a-23a).

The majority asserts that the MPN-ban is necessary to ensure that "the winner of an election is the choice of a majority or at least a plurality of the voters" (App. A at 5a-6a). This interest is not even rationally related to the MPN-ban. Under MPN, as under an MPN-ban, the winner of a party's primary is the candidate with the most votes in that primary, and the winner of a general election is the candidate with the most votes in that election. Moreover, the inter-party alliances permitted by MPN make it more likely, not less, that winning candidates will enjoy the support of a clear majority of voters.

The majority asserts that the MPN-ban is necessary to avoid voter confusion (*Id.* at 6a). But this Court has shown great reluctance to credit fears of voter confusion as a rationale for limiting fundamental rights. *Norman,* 112 S. Ct. at 706; *Tashjian,* 479 U.S. at 220; *Anderson,* 460 U.S. at 798. Moreover, there is no evidence that MPN produces confusion (R14, Reply Ex. C ¶¶ 11, 13). Indeed, as the dissent notes, MPN improves the quality of information available to voters by signalling more precisely the diverse sources of a candidate's support (App. C at 22a-23a).

The majority asserts that the MPN-ban is necessary to prevent an "unlimited" number of minor parties (App. A at 6a). This concern is baseless. Neither the widespread practice of MPN in the late 19th century, nor its current practice, has ever led to a large number of minor parties on the ballot. Moreover, the legal status of MPN is irrelevant to state rules on ballot access. Such rules, not MPN, are what effectively determine the number of parties allowed on the ballot.

The majority asserts that the MPN-ban is necessary to avoid party "raiding," or mischievous entry to a party's primary by voters supportive of another party. *(Id.)* This interest is not even

rationally related to the MPN-ban. Wisconsin primaries are "open" to all registered voters, irrespective of their party affiliation, and provide no deterrent to party raiding (*Id.* at 11a). This situation would not be improved, or worsened, by eliminating the MPN-ban.

The majority asserts that the MPN-ban is necessary to avoid the involuntary nomination of candidates by extremist parties (*Id.* at 6a). This concern is irrelevant to the instant case, where the candidate *consented* to joint nomination, and it is not narrowly advanced by the challenged statute. The "simple expedient" of a requirement of candidate consent to any nomination would fully meet the concern in a way less burdensome than a blanket MPN-ban. *Norman,* 112 S. Ct. at 706.

Judge Fairchild asserts that the MPN-ban should be upheld because it may contribute to the distinctness of parties, which in turn may contribute to political stability (App. at 10a-11a). The authority cited for this argument, however, is inapposite, and the argument itself contravenes the First Amendment.

Judge Fairchild rests his concurrence on *Storer v. Brown,* 404 U.S. 724 (1974); *Rosario v. Rockefeller,* 410 U.S. 752 (1973); and *Lippitt v. Cipollone,* 404 U.S. 1032 (1972). (*Id.* at 11a-12a). These three cases, however, involve voter or independent candidate challenges to state electoral laws protective of political parties. They do not involve, as this case does, a party's own assertion of its right to engage in partisan activity free of state interference.[9] They are therefore inapposite.

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9. The importance of this distinction is stressed in *Tashjian:*

> It is this element of potential interference with the rights of

(Cont'd)

Judge Fairchild's view that states may legitimately seek to ensure the distinctness of party ideologies and platforms conflicts with fundamental First Amendment values. States have no business dictating the content of political party platforms and ideologies; the use of an MPN-ban to *force* distinctness is not a legitimate exercise of state power. Moreover, the goal sought by Judge Fairchild may be achieved more simply, and with less burden to fundamental freedoms, by eliminating the MPN-ban. As the dissent below rightly suggests, the only real purpose served by an MPN-ban is to "protect . . . the political status quo" (App. C. at 24a) by restraining free and fair party competition. Such competition is the best guarantor of the party distinctness Judge Fairchild seeks. It can be furthered by eliminating the artificial restraints on party competition imposed by the MPN-ban.

(Cont'd)

> the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. See *Rosario v. Rockefeller* . . . Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules . . . These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers.

479 U.S. 208, at 215, n. 6 (other citations omitted).

CONCLUSION

For these reasons, petitioners' request for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 90-2781, 90-2884

GEORGE SWAMP, JOHN HENDRICK and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Plaintiffs-Appellants,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, and PETER R. DOHR, THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 90 C 0504
John C. Shabaz, Judge.

ARGUED JANUARY 25, 1991—DECIDED DECEMBER 3, 1991

Before MANION and KANNE, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

KANNE, *Circuit Judge*. George Swamp, John Hendrick and the political party of which they are members, the Labor-Farm Party/Partido Laborista-Agario (collectively the "Labor-Farm

Party"), challenge the constitutionality of Wisconsin's statutory ban on "multiple party nominations," which prohibits a candidate from being nominated by more than one party for the same office in the same election.[1] Members of the Labor-Farm Party sought to place the name of Douglas La Follette on that Party's primary ballot for Secretary of State; however, nomination papers had previously been filed to place his name on the primary ballot of the Democratic Party. The Labor-Farm Party argues that the ban unconstitutionally infringes on its rights of free speech and association guaranteed by the First and Fourteenth Amendments of the United States Constitution.[2] The district court denied the Party's motion for injunctive relief and motion for summary judgment, and dismissed the action. We affirm.

The Supreme Court recently reiterated the framework for assessing the constitutionality of a state election law in *Eu v. San*

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1. Wisconsin Statute § 8.15(7) provides:

> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.

Wisconsin Statute § 8.03(1) provides further:

> The name of any candidate who is nominated to the same office by more than one party . . . shall appear under the party first nominating him or her . . . .

2. Although the relevant elections have occurred, the action is not moot because this issue is "capable of repetition, yet evading review." *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 93 S. Ct. 1245, 1249 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 1494 (1969).

Appendix A

Francisco County Democratic Central Committee:

> A State's broad power to regulate the time, place and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S. [208], 217, 107 S. Ct. [544], 550 [(1986)]. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.

489 U.S. 214, 222, 109 S. Ct. 1013, 1019-20 (1989) (other citations omitted).

It is well settled that partisan political organizations enjoy the freedom of association protected by the First and Fourteenth Amendments. *Eu*, 489 U.S. at 224, 109 S. Ct. at 1020. The Labor-Farm Party contends that the multiple party nomination ban burdens its associational rights in two ways.

First, the Party argues that the ban infringes upon party autonomy by restricting its ability to select candidates for electoral office. Although the freedom of association encompasses a political party's decisions about the identity of, and the process for electing, its leaders, *Id.*, 489 U.S. at 229, 109 S. Ct. at 1024, a party's associational rights are not absolute and are necessarily subject

to qualification if elections are to be run fairly and effectively. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533, 536 (1986). The ban prohibits a candidate from running in more than one party primary for the same office in the same election. Therefore, the right of party members to associate is only limited to the extent that they are prevented from placing on their primary ballot the name of a candidate who has previously been placed on the primary ballot of another party. The ban does not substantially burden the "availability of political opportunity," *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 1320 (1974), because a party may nominate any candidate that the party can convince to be *its* candidate. Here, La Follette filed his own nomination papers as a candidate for Secretary of State in the Democratic primary and submitted an affidavit stating that he is a "life-long Democrat." The Labor-Farm Party has no right to associate with a candidate who has chosen to associate with another party.

Second, the Labor-Farm Party maintains that the ban is disproportionately burdensome on minority parties and limits competition. A burden that falls unequally on new or small political parties discriminates against those parties and voters whose political preferences lie outside the existing political parties. *Anderson v. Celebrezze*, 460 U.S. 780, 794-95, 103 S. Ct. 1564, 1572 (1983). Accordingly, the Labor-Farm Party asserts that, unlike major parties, minority parties cannot win state-wide elections on their own, without going into coalition with other parties. Therefore, the Party concludes that the ban has a disproportionate impact on the electoral success of third parties and burdens their efforts to compete, publicize their views, and widen their popular base of support. We disagree.

The Labor-Farm Party acknowledges that there is no

competition among parties if parties choose the same candidate for an office, but asserts that by choosing a candidate already nominated by another party a minority party can gain strength overall, irrespective of any particular campaign. This argument cuts against the Party's position. Allowing minority parties to leech onto larger parties for support decreases real competition; forcing parties to chose their own candidates promotes competition.[3] *Cf. Hall v. Simcox*, 766 F.2d 1171, 1176 (7th Cir.) (finding that a restriction on ballot access ratifies competition by keeping off the ballot those parties so lacking in electoral appeal that they contribute little to political diversity), *cert. denied*, 474 U.S. 1006, 106 S. Ct. 528 (1985).

The ban also does not burden a minority party's efforts to publicize its views or widen its base of support; it merely restricts a party from nominating another party's candidate. A party can support a candidate previously nominated by another party if that candidate best represents its views or the party is free to choose any other candidate to express its views.

Even if the ban burdens the associational rights of political parties, it is justified by compelling state interests. The district court recognized the legitimate interest of the State in assuring that the winner of an election is the choice of a majority or at least a plurality of the voters. *Bullock v. Carter*, 405 U.S. 134, 145, 92 S. Ct. 849, 857 (1972). If a candidate appears on the

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3. The true motivation of the Labor-Farm Party in bringing this action may be to retain its "ballot status," or ability to run candidates in state elections on a specifically designated party line. To retain this status, a party must earn a certain percentage of the vote in each election. By running a popular Democratic Party candidate, the Labor-Farm Policy has an opportunity to garner this percentage.

primary ballots of more than one party but is defeated in all the primaries in which he runs, his name will not be on the general ballot even though he may have received the majority of votes in the aggregate.

Avoiding voter confusion is also a compelling state interest. *Bullock*, 405 U.S. at 145, 92 S. Ct. at 857. By limiting the names on the ballot to those who have won the primaries, voters will be presented "with understandable choices and the winner in the general election with sufficient support to govern effectively." *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 1281 (1974). Without a ban on multiple party nominations, an unlimited number of minority parties could nominate the candidate of a major party for the same office, causing serious confusion for voters. Because the candidate would be presented by the different parties as representing the particular views and preferences of each party, it would be difficult for voters to distinguish between the parties.

Moreover, the State has a compelling interest in preserving the integrity of its election process. *Eu*, 489 U.S. at 231, 109 S. Ct. at 1024; *Rosario v. Rockefeller*, 410 U.S. 752, 761, 93 S. Ct. 1245, 1251 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 345, 92 S. Ct. 995, 1004 (1972); *Bullock*, 405 U.S. at 145, 92 S. Ct. at 857. Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Eu*, 489 U.S. at 231, 109 S. Ct. at 1024 (citing *Storer*, 415 U.S. at 730, 94 S. Ct. at 1279).

Wisconsin has a legitimate interest in seeking to curtail "raiding" whereby voters who are sympathetic with one party vote on the ballot of another party so as to influence or determine the results of that other party's primary. *Tashjian v. Republican*

Party of Connecticut, 479 U.S 208, 219, 107 S. Ct. 544, 551 (1986); *Rosario*, 410 U.S. at 760, 93 S. Ct. at 1251; *Bullock*, 405 U.S. at 145, 92 S. Ct. at 857 ("[s]tate has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies"). For example, if multiple party nominations were permitted, the National Socialist Party could nominate a candidate who has been nominated by a major party and is adverse to the National Socialist Party's interests in order to encourage voters opposing the National Socialist Party to defeat the candidate.

The ban also limits involuntary fusion of political parties. Maintaining a stable political system is a compelling state interest. *Eu*, 489 U.S. at 226, 109 S. Ct. at 1022. States may regulate elections to ensure that "some sort of order . . . accompan[ies] the democratic process." *Storer*, 415 U.S. at 730, 94 S. Ct. at 1279.

Wisconsin's ban on multiple party nominations does not burden the associational rights of political parties and is justified by compelling state interests. The district court properly denied the Labor-Farm Party's motion for injunctive relief and motion for summary judgment, and dismissed the action.

The judgment of the district court is AFFIRMED.

Appendix A

FAIRCHILD, *Senior Circuit Judge*, concurring.

"Freedom of association means . . . that a political party has a right . . . to select a 'standard bearer who best represents the party's ideologies and preferences.' " *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (citations omitted). If a law "burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that interest." Id. at 222 (citations omitted).

In applying the *Eu* formula, the first question is whether the prohibition against cross-filing burdens plaintiff's rights. The majority opinion intimates that the burden is small because the only persons plaintiffs are prevented from placing on their primary ballot are persons previously placed on the primary ballot of another party. Apparently deeming the burden minimal, the majority opinion ultimately concludes there is no burden on associational rights.

Perhaps there is room for a balancing process, and for dismissing the burden here as insignificant. The Supreme Court has described the applicable analytical process as follows:

> [A Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and

> strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (citations omitted).

The second step under *Eu* is to identify the state interest served and decide whether it is "compelling." Identifying a state interest important enough to be "compelling" presents difficulties. Two Justices of the Supreme Court have expressed discomfort with the "compelling state interest" test. *Eu*, 489 U.S. at 233-34 (Stevens, J., concurring) (quoting *Illinois Bd. of Elections v. Socialists Workers' Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring)). Not all states consider that a prohibition against cross-filing serves a compelling interest. Several states including New York, Massachusetts, and Pennsylvania,[1] allow multiple party nominations.

Assuming the prohibition against cross-filing does burden associational rights, the majority opinion then concludes that the burden is justified by compelling state interests. Three "compelling" state interests are identified: (1) avoiding voter confusion, (2) preserving the integrity of the election process, and (3) maintaining a stable political system. With all respect, I am

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1. *See, e.g.*, Conn. Gen. Stat. § 9-453t (1990); Mass. Gen. L. ch. 54 § 41 (1991); N.H. Rev. Stat. Ann. § 659:68 (1990); N.Y. Elec. Law § 6-146 (McKinney 1991); 25 Pa. Cons. Stat. § 3010(f) (1989); Utah Code Ann. § 20-5-11(2) (1991).

unable to agree that state interests (1) and (2) are advanced by the prohibition against cross-filing. I will reach state interest (3) at a later stage.

The majority opinion also identifies two state interests characterized as "legitimate": (1) assuring that the winner of an election is the choice of a majority, or at least a plurality of the voters, and (2) seeking to curtail voters sympathetic to one party voting in the primary of another party. Again, I am unable to agree that prohibition against cross-filing does anything to advance either of these interests, even if labeled "compelling." The problem suggested by the majority opinion, that one party could damage the candidate of another party by nominating him, could be prevented by a much more narrow provision requiring an acceptance by the candidate before his name could be placed on the primary ballot.

The majority's third "compelling" interest is maintaining a stable political system. I would describe the interest served by prohibiting cross-filing more narrowly. It is the interest in maintaining the distinct identity of parties. People may rationally believe that in a party system, each party should have a distinct ideology, platform, and the like, and it seems arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party. This may be true as a general proposition even though there may be individual instances where two parties may have the same position on one or more issues. In the present case, where the candidate seeks the non-policy-making office of secretary of state, his being the candidate of two parties could do little real damage to the distinct identity of principles of the parties.

It happens that Wisconsin (other than prohibiting cross-filing)

seems not to place a high value on maintaining the distinct identity of parties. It does not require voters to register their political affiliation. When any voter enters the booth at a partisan primary election, Wisconsin gives the voter the complete freedom, in privacy, to choose the party in whose primary he will vote that day. A person is not prohibited from being a candidate in the primary of one party even if he has voted in, or been the candidate of, another party at an earlier election. Nevertheless, if one believes it important that parties should be so distinct in their principles and ideologies that one candidate is unlikely to be able, conscientiously and effectively, to represent more than one party in the same election, the prohibition against cross-filing does advance that interest.

In any event, maintaining the distinct identity of parties can be viewed as one facet of maintaining a stable political system. The Supreme Court has recognized a State's interest in the stability of its political system as "compelling." *Storer v. Brown*, 415 U.S. 724, 736 (1974). The California statute upheld in *Storer* forbade "ballot position to an independent candidate for elective public office . . . if he had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election." *Id.* at 726. The Court relied on *Rosario v. Rockefeller*, 410 U.S. 752 (1973) upholding a provision "that to vote in a party primary the voter must have registered as a party member 30 days prior to the previous general election, a date eight months prior to the presidential primary and 11 months prior to the nonpresidential primary." *Storer*, 415 U.S. at 731. The Court also set forth California's decision to forbid cross-filing, reached in 1959, after having permitted it for many years. *Id.* at 734. It also cited *Lippett v. Cipollone*, 404 U.S. 1032 (1972). *Id.* at 736. There the Court affirmed, without opinion, a district court decision upholding a statute which prohibited being a

candidate for nomination at a party primary if the person voted at the primary of a different party within the preceding four years. The measures mentioned in *Storer*, *Rosario*, and *Lippett* all serve the purpose of maintaining distinct party identity. *Storer* found that to be a compelling state interest, though under the rubric of stability of the political system.

I am persuaded that *Storer* requires affirmance in this case, and therefore concur.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for The Seventh Circuit

APPENDIX B — CORRECTED MEMORANDUM OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WISCONSIN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

90-C-504-S

GEORGE SWAMP, JOHN HENDRICK and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Plaintiffs,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, and PETER R. DOHR, THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Defendants.

CORRECTED MEMORANDUM

On August 10, 1990, plaintiffs' motion for emergency injunctive relief was denied and judgment was entered in favor of the defendants, dismissing plaintiffs' complaint and all claims contained therein. On August 9, 1990 the court stated its findings of fact and conclusions of law from the bench upon the completion of the hearing held for the determination of the plaintiffs' motion for emergency injunctive relief. At that time the court reserved the right to file a written supplementary memorandum. This is

that written memorandum.

The plaintiffs George Swamp, John Hendrick and Labor-Farm Party/Partido Laborista-Agrario, request declaratory relief determining that Wisconsin Statute § 8.15(7) and Wisconsin Statute § 8.03(1) violate their constitutional rights: specifically, the right of association guaranteed by the First Amendment of the United States Constitution. The statutes at issue provide in pertinent part as follows:

> Wis. Stat. § 8.15(7):
>
> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.
>
> Wis. Stat. § 8.03:
>
> The name of any person nominated to the same office by more than one party or primary or nominated for more than one partisan or state nonpartisan office shall appear under the party first nominating him or her or under the office to which he or she was first nominated.

The decisions of the United States Supreme Court are contrary to plaintiffs' position which recognizes that a state has a legitimate interest in regulating the number of candidates on the ballot. *Bullock v. Carter*, 405 U.S. 134, 145 (1971). The court in Bullock held:

> [T]he State understandably and properly seeks to

> prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of run-off elections.

The Supreme Court further articulated this position in *Rosario v. Rockefeller,* 410 U.S. 752 (1972). The *Rosario* Court stated: "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." *Id.* at 761. Finally, in *Storer v. Brown,* 415 U.S. 724, 734 (1973), the Court restated its position previously espoused in *Bullock:*

> After long experience, California came to the direct party primary as a desirable way of nominating candidates for public office. It has also carefully determined which public offices will be subject to partisan primaries and those that call for nonpartisan elections. Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959. A candidate in one party primary may not now run in that of another . . . .

Here, the plaintiffs acknowledge these decisions. Nevertheless, they argue that *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986) is controlling. The Supreme Court in *Tashijian* held:

> The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment

> interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Id. at 224. The court distinguishes *Tashijian* from *Storer* and *Rosario* where the state action was not undertaken to prevent the disruption of political parties from the outside, but rather to prevent the parties from taking internal steps which would adversely effect their own process for the selection of candidates. Finally, it is appropriate to review *Eu v. San Francisco County Democratic Central Committee,* 109 S.Ct. 1013 (1989) where the United States Supreme Court set forth the parameters used to assess the constitutionality of a state election law. The court stated:

> A state's broad power to regulate the time, place and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.' To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.
>
> * * *
>
> Barring political parties from endorsing and opposing candidates not only burdens their

> freedom of speech but also infringes upon their freedom of association. It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to 'identify the people who constitute the association,' and to select a 'standard bearer who best represents the party's ideologies and preferences.'

Id. at 1019-1021, (citations omitted).

Pursuant to the arguments advanced by the parties and applying the applicable law noted herein, this Court upheld the action of the defendants which withheld the name of Douglas J. La Follette from the Labor Farm Party ballot because he had previously qualified for nomination on the ballot of the Democratic Party. The plaintiffs' inability to place Douglas J. La Follette on the Labor Farm primary ballot for September of 1990 did not violate their First Amendment rights.

In addition, the court received an affidavit from Douglas J. La Follette advising the Court that he has been a life-long member of the Democratic party and continues and will continue to pursue the Democratic principles for the remainder of his life. Examining all of the circumstances presented, including the affidavit of Douglas J. La Follette, the plaintiffs and the Labor Farm Party have not been deprived of the right to select a standard bearer who best represents the ideologies and preferences of the Labor Farm Party.

Furthermore, they are not deprived from pursuing a standard bearer of their choice who represents the party's ideologies and preferences pursuant to appropriate write-in procedures. Even were it determined that the statutes which plaintiffs seek to have declared unconstitutional burden their rights to free speech and free association, they can survive where they serve a compelling governmental interest. *Bullock* refers to the need for stable government and an election process that avoids voter confusion and undue influence, suggesting that the maintenance of a stable political system is unquestionably a compelling state interest. There is no question that placing a candidate on more than one ballot will cause voter confusion, but more than this *Bullock* recognizes the legitimate interest of a state to assure that the winner is a choice of a majority, or at least a strong plurality. Concisely stated, a candidate on two partisan primary ballots can receive the greatest number of votes but can nevertheless be denied a place on the general election ballot where that candidate finishes second to each of the front runners on the two primary ballots where he or she was named.

In conclusion, this Court is of the opinion that Wisconsin Statutes § 8.15(7) and § 8.03(1) do not burden plaintiffs' rights to free speech and free association, and even if that were the case the defendants have offered compelling governmental interests to survive constitutional scrutiny.

This represents the supplement to which this Court referred in its statement from the bench on August 9, 1990, and in its order of August 10, 1990 denying plaintiffs' request for a preliminary injunction and granting judgment in favor of the defendants dismissing plaintiffs' complaint.

Entered this 27th day of August, 1990.

Appendix B

THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 11, 1992

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge**

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* Senior Circuit Judge Fairchild did not participate in the consideration of the suggestion for rehearing *en banc*.

Appendix C

Nos. 90-2781 & 90-2884

GEORGE SWAMP, JOHN HENDRICK and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Plaintiffs-Appellants,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, and PETER R. DOHR, THOMAS P. GODAR, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 90 C 504

John C. Shabaz, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on December 26, 1991, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. Judges Posner, Easterbrook and Ripple voted to grant rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

Appendix C

IT IS THEREFORE ORDERED that the request for rehearing *en banc* is hereby, DENIED; IT IS FURTHER ORDERED that the petition for rehearing is hereby DENIED.

RIPPLE, *Circuit Judge,* with whom POSNER and EASTERBROOK, *Circuit Judges,* join, dissenting from the denial of rehearing en banc. The panel opinion, while it articulates established standards, actually deviates in important respects from the methodology and analysis employed by the Supreme Court in *Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214 (1989), and *Norman v. Reed,* No. 90-1126, slip op. (U.S. January 14, 1992), (The panel did not have the benefit of the latter).

First, while acknowledging that political parties enjoy associational rights, *Swamp v. Kennedy,* Nos. 90-2781 & 90-2884, slip op. at 3 (7th Cir. Dec. 3, 1991), the panel concludes — categorically — that the Wisconsin ban on multiparty nominations does not burden those rights, *id.* at 6. Certainly, a more indepth examination of the associational rights at issue is required by established case law. *See Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983) (court must examine character and magnitude of the rights at stake). The Supreme Court has recognized that the right of a party to nominate a candidate of its choice is a vital aspect of the party's role in our political structure. *See Eu,* 489 U.S. at 224. The ability to choose the same person as another party is an important aspect of that right. It allows a party to form significant political alliances. When a minor party nominates a candidate also nominated by a major party, it does not necessarily "leech onto," *Swamp,* slip op. at 4, the larger party for support. Rather, it may — and often does — offer the voters a very real and important choice and sends an important message to the candidate. If a person standing as the candidate of a major party

prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party. If a majority of the members of both major parties believe the same person is the best candidate, that alliance is of major significance in our political life. Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor. In short, permitting people to vote for a candidate on one party line rather than another increases the opportunity of both voter and party to be heard and for workable political alliances to be formed.

Second, a state may assert important countervailing state interests. However, those state interests must be *real* ones and, under the prevailing analysis of *Norman,* must be sufficiently weighty to justify the restriction. *Norman,* slip op. at 8. Any severe restriction must be narrowly drawn to advance a state interest of compelling importance. *Id.* While there is a state interest in avoiding "voter confusion," *Swamp,* slip op. at 5, there are less restrictive alternatives to achieving that goal than by decreeing that, no matter how many members of a particular party want a particular candidate, he or she may not be their candidate simply because members of another party believe that the candidate also would best deliver the principles of their platform.

States also have an interest in the integrity of the election process, but the panel does not suggest any particular evil that necessitates this broad and severe regulation. *Id.* at 6. As the concurring opinion points out, it is not at all clear that Wisconsin, which permits cross-over votes, has an important interest in preventing the sort of "raiding" that the panel foresees. *Swamp,* slip op. at 9 (Fairchild, J., concurring). "Involuntary fusion," *Swamp,* slip op. at 6, of political parties sounds ominous.

However, if two parties end up with the same candidate because the voters in each party voted for that result, the resulting alliance can hardly be termed "involuntary." A significant part of the electorate has expressed its desire for a political alliance. A state's interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.

APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES

§ 8.15(7) Wis. Stats. states, in pertinent part:

> A candidate may not run in more than one party primary at the same time. No filing official may accept nomination papers for the same person in the same election for more than one party.

§ 8.03(1) Wis. Stats. states, in pertinent part:

> The name of any candidate who is nominated to the same office by more than one party or primary . . . shall appear under the party first nominating him or her or under the office to which he or she was first nominated. If the double nomination is simultaneous, the candidate who is nominated, before the deadline for filing nomination papers shall file a written statement with the same person with whom he or she files nomination papers stating the person's party or office preference. If the candidate fails to select the party or office, the filing officer shall place the candidate's name on the ballot under either party or office, but may not permit it to appear more than once. If a candidate is nominated at a primary election for partisan office . . . on a ballot where his or her name appears or by nomination papers filed by the candidate, and is also nominated by write in votes . . . as the candidate of a different party, the candidate does not have a choice, but shall be placed on the ballot for the election under the office and party for which the candidate's name appeared on the primary ballot or for which the

candidate had filed nomination papers.

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
APR 30 1992
OFFICE OF THE CLERK

(2)

No. 91-1589

In The
Supreme Court of the United States
October Term, 1991

GEORGE SWAMP, JOHN HENDRICK, and LABOR-FARM PARTY/ PARTIDO LABORISTA-AGRARIO,

Petitioners,

vs.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, PETER R. DOHR and THOMAS P. GODAR, MARK E. SOSTARICII, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Respondents.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Seventh Circuit

BRIEF OF THE CONSERVATIVE PARTY OF NEW YORK AND THE LIBERAL PARTY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

The Conservative Party of New York State (the "Conservative Party") and the Liberal Party of New York State (the "Liberal Party") submit this brief in support of the petition for certiorari of George Swamp, John Hendrick and Labor-Farm Party/Partido Laborista-Agrario to review the decision of the United States Court of Appeals for the Seventh Circuit in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991). The parties have consented to the filing of this brief. The amici support the petition for certiorari because the issue presented in *Swamp v. Kennedy* is of critical import to the Conservative and Liberal Parties and merits plenary review.

Petitioners in this case challenge the constitutionality of a Wisconsin law banning multiple party nominations ("MPN"), that is, the nomination of the same candidate to the same office in the same election by more than one party. Wis. Stats. §§ 8.15(7) and 8.03(a). New York has no such ban; instead, New York explicitly permits the nomination by multiple parties of the same person for the same office in the same election, so long as the parties and the candidate consent. N.Y. Elec. Law §§6-120(3), 6-146(1) (McKinney's 1978 & Supp. 1992). The Conservative and Liberal Parties have actively used MPN to nominate candidates for office who are also the nominees of another party, typically nominees of the Republican or Democratic Party. If New York were constitutionally permitted (under both the federal and state constitutions) to enact a law such as the Wisconsin statute at issue herein, and if it were to do so, the consequences for the Conservative and Liberal Parties would be grave.

MPN is one of the most effective means available for the Conservative and Liberal Parties to participate in the electoral process. If it were not available, the number of races in which the Conservative and Liberal Parties could participate effectively would be significantly reduced. Moreover, members of the Conservative and Liberal Parties would be deprived of an important vehicle for expressing their political views. Voters who can now vote for a candidate on more than one ballot line can,

through their choice of line, send to the candidate a message about which portion of his or her platform they particularly wish to support. Without MPN, they would not be able to do so. They would often be compelled to choose between "wasting" their votes on a candidate unlikely to succeed, or offering undifferentiated support to a major party candidate. Thus, both the Conservative and Liberal Parties and their members have interests that may be adversely affected by the Seventh Circuit's decision upholding a ban on MPN.

SUMMARY OF ARGUMENT

The lower court's decision fundamentally misapprehends the way in which MPN can and does work. This is no great surprise, since no state within the Seventh Circuit permits MPN. *See* Petition at 3-4, n.3. The lower court was thus forced, without any experience with MPN, to guess at the effects MPN might have on political parties and the electoral system. We submit this brief to present the experience of the Conservative and Liberal Parties with MPN in New York during the past several decades. That experience demonstrates that the Seventh Circuit's guesses as to the effects of MPN are flatly wrong. Based on these incorrect guesses, the court below has upheld a state statute that fundamentally infringes upon core First and Fourteenth Amendment rights of political parties and voters without furthering any compelling state interest.

The majority below completely ignores the fact that MPN is a crucial tool for minor and new parties to build coalitions with other parties, and thus for minor and new parties and their adherents to participate effectively in the electoral process. Contrary to the conclusion of the majority, a ban on MPN *would* restrict the right of parties to choose a standard bearer who best represents the interests of the party. It would also restrict the ability of voters to indicate their reasons for supporting a particular candidate by voting on the ballot line of a party most sympathetic to that voter's views.

The Seventh Circuit also incorrectly identifies as compelling various state interests asserted in justification of an MPN ban. None of the negative effects of MPN alleged by the court below exist in New York.

First, states have no compelling interest in ensuring that a candidate obtain office simply because he or she has won a large number of votes in one or more party's primary. General elections ensure that the winner is the choice of a majority or plurality of the voters. Although voter confusion is certainly a legitimate concern of the state, in our combined experience of over seventy years with MPN in New York, we have yet to see any evidence of voter confusion as a result of the use of MPN. In fact, our experience has been that voters appreciate greatly the choices provided by MPN.

Second, although the state has a compelling interest in preserving the integrity of the electoral process by preventing involuntary fusion, a ban on MPN is unnecessary to address this interest. As the New York experience demonstrates and the petitioners have pointed out, a simple requirement of consent by the candidates or parties (or both, as in New York) fully and effectively addresses this concern.

Finally, the concurrence below argues that a ban on MPN furthers the state's compelling interest in maintaining the distinct identity of political parties. Prior to the decision below, we are aware of no court that has held that a state has such a compelling interest. Even if the state has such a compelling interest, the experience of the Conservative and Liberal Parties in New York has been that the use of MPN has *increased* the distinct identities of political parties.

This Court should grant certiorari to review the decision of the Seventh Circuit and uphold the First and Fourteenth Amendment rights enjoyed by minor and new political parties and voters.

ARGUMENT

I. A BAN ON MULTIPLE PARTY NOMINATIONS BURDENS CORE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES AND VOTERS

The first of the errors of the majority opinion below is its assertion that a ban on MPN "does not substantially burden the 'availability of political opportunity,' because a party may nominate any candidate that the party can convince to be *its* candidate." 950 F.2d at 385 (citation omitted) (emphasis in original). That claim is completely at odds with the experience in New York.

It is difficult to imagine an act that would more substantially burden the "availability of political opportunity" for political parties in New York than a ban on MPN. MPN is a commonly employed means for political parties to form coalitions. In 1990, for example, the Conservative Party nominated a candidate who was the nominee of another party in 160 of the 202 races in which the party participated. In that year the Liberal Party used MPN to nominate its chosen standard bearer in 99 of the 116 races in which it participated.

MPN also has been an effective political strategy, with votes on the Conservative or Liberal line often providing the margin of victory for a candidate also nominated by one of the major parties. Alphonse D'Amato, for example, would not have won a Senate seat in 1980 without the votes he received on the Conservative Party line, nor would Ronald Reagan have carried New York State in the Presidential election that year without Conservative votes. (Department of State, State of New York, *Manual for the Use of the Legislature of the State of New York 1980-1981* 1137-41). Similarly, in 1990, Edward Regan, who was the Republican nominee for State Comptroller, won by fewer than the 391, 743 votes he received as the Conservative Party's nominee for the same office. (*The New York Red Book 1991-1992* 1022 [C.A. Mitchell ed. 1991]).

Votes on the Liberal Party line provided the margin of victory for John F. Kennedy in 1960 and for W. Averell Harriman when he ran for Governor in 1954. (Mazmanian, *Third Parties in Presidential Elections* 120-21 [1974]). Fiorello LaGuardia became Mayor of New York because he was the nominee of the Republican Party and the City Fusion Party (Board of Elections, City of New York, *Annual Report of the Board of Elections in the City of New York* 56-57 [1933]); and John Lindsay became Mayor of New York because he was nominated by both the Liberal and Republican Parties. (Board of Elections, City of New York, *Annual Report of the Board of Elections in the City of New York* 99 [1965]).

For the Republican Party in New York City, MPN provides a particularly critical political opportunity. Registered Democrats outnumber registered Republicans in New York City by five to one, resulting in a greater need for Republican candidates to receive multiple nominations in order to gain office.

For voters, as well as parties, the availability of political opportunity would be substantially burdened if MPN were eliminated. By voting for a candidate on the Conservative or Liberal line rather than on the line of one of the major parties, voters send a message that it is the conservative or liberal portions of the candidate's platform that they support. If MPN were banned, voters often would be forced to choose between "wasting" their votes on minor party candidates with little chance of success, and voting for a major party candidate without any opportunity to convey a message other than undifferentiated support.

II. A BAN ON MULTIPLE PARTY NOMINATIONS WOULD HURT NEW AND MINOR PARTIES MORE THAN THE MAJOR PARTIES

The second of the errors of the majority below was its conclusion that a ban on MPN does not disproportionately burden minor parties. Again, the experience in New York does not support this conclusion.

While major parties would suffer little, if at all, from a ban on MPN, such a ban would have disastrous consequences for minor and new parties. The use of MPN provides one of the best opportunities for members of minor and new parties, as well as other voters, to indicate their party preference. If two parties nominate the same candidate, a voter who supports that candidate can indicate his or her party preference as between the two nominating parties. Without MPN, a voter who supports a minor party and its candidate, but also prefers one major party candidate over the other major party candidate, will be forced to choose between supporting the minor party by voting for its candidate (who is unlikely to win, since he or she is the candidate of a minor party), and voting for the major party candidate most sympathetic to his or her views, thus indicating no support for the minor party.

A ban on MPN would also harm minor and new parties themselves. These parties would lose the votes of all voters who, as described above, are reluctant to "waste" their votes. The public indication of support for such parties, as reflected in numbers of electoral votes, would be lower than the actual support among the electorate. This undervaluation injures minor parties in two ways. First, it detracts from the prestige of the party, making it harder for the party to attract votes and to recruit new members. Second, it makes it harder for the party to attract viable candidates. If candidates were required to run on only one ballot, there is little doubt that many of those with the experience and public stature necessary to be viable candidates would hesitate to run solely on the ticket of a minor party which, by definition, has fewer resources to support its candidate than a major party. This problem is only exacerbated as

the geographic scope and cost of the campaign increase, and would be greatest at the level of the gubernatorial races. This is critical in New York, for example, since a party must win 50,000 votes in each gubernatorial election to maintain its status as a party, *see* N.Y. Elec. Law §1-104(3) (McKinney's 1978 & Supp. 1992), and its line on the ballot. *See* N.Y. Elec. Law §7-104(5) (McKinney's 1978 & Supp. 1992). The task of meeting such a requirement by running a candidate exclusively on a minor party line would require a party to devote extraordinary resources locating and supporting a viable gubernatorial candidate who is not supported by one of the major parties, resources that might be better spent in other local and state races in which such a party has a greater likelihood of success. MPN simply permits a minor party to nominate and secure the consent of otherwise viable candidates who are supported by one of the major parties, and thus in New York gives minor parties the opportunity to secure the requisite 50,000 votes without suffering from the handicap imposed by the reluctance of otherwise supportive voters to vote for candidates with little chance of success. Without the option of MPN, participation in the electoral process becomes a sisyphean task with minor parties spending enormous resources to convince their supporters to vote for candidates with little chance of success in order to retain their party's ballot status.

New minor parties in particular would be hurt by a ban on MPN. It is especially difficult to persuade those with the experience and public stature to be viable candidates to be the nominees of new parties, which have the fewest resources available to support a campaign. If new parties were forbidden to form coalitions with the major parties or other minor parties to support particular candidates, they would be stripped of one of their most powerful means of quickly making an impact on the electoral scene. The Liberal Party's first nominee, for example, was Franklin D. Roosevelt in 1944. New Yorkers cast 329,235 votes for Roosevelt on the line of the Liberal Party, which was then less then one year old. (*The New York Red Book 1945* 546 [J. Mearns ed. 1945]). Without those votes Roosevelt would have lost in New York. *Id.* The size of the vote for Roosevelt on the Liberal Party line sent a message to

Roosevelt and all of New York's political parties about the appeal of the Liberal position. By accepting the Liberal nomination, Roosevelt helped to establish quickly a new force in New York State politics that, without MPN, undoubtedly would have had a much more difficult time establishing itself.

In support of its conclusion that a ban on MPN does not discriminate against minor political parties, the majority below claims that there is no competition among parties if they choose the same candidate, and that MPN would simply permit minor parties to "leech onto" larger parties. 950 F.2d at 385. Again, the lower court has misapprehended the way MPN works. If a minor and a major party nominate the same candidate, the competition for votes has not ended. If, for example, the Republican and Conservative Parties nominate the same candidate, the Conservative Party wants that candidate to win, but also wants him or her to win with as large a share of votes on the Conservative line as possible, so that the candidate will be more likely, as an office holder, to take positions consistent with those of the Conservative Party. In addition, the Conservative Party wants as many votes on the Conservative line as possible to demonstrate the party's strength and enhance its legitimacy among the electorate. The same is true with respect to the Liberal Party and its opportunity to nominate either Democratic or Republican candidates.

The majority below is wrong in characterizing MPN as permitting minor parties to "leech onto" the larger parties. MPN permits coalitions, which benefit both the major and minor party by making more likely the election of a candidate whom both parties support. As described above, votes on the Conservative and Liberal Party lines have often provided the critical margin of victory to a candidate nominated by the Republican or Democratic Party. The degree to which parties and their candidates choose to pursue that strategy is properly left to those immediately involved. If a party wishes not to nominate a candidate who is also the nominee of another party, it can simply withhold its nomination.

III. NO COMPELLING STATE INTEREST JUSTIFIES A BAN ON MULTIPLE PARTY NOMINATIONS

The lower court has attempted to justify Wisconsin's ban on MPN based on a number of evils that allegedly would result if MPN were permitted. During our long experience with MPN, New York has been afflicted by none of those evils.

A. No Ban on Multiple Party Nominations is Necessary to Ensure That the Winner of an Election is the Choice of a Majority or a Plurality of the Voters

In support of a ban on MPN, the majority below argues that the ban is necessary to ensure that the winner of an election is the choice of a majority or a plurality of the voters. If a candidate appears on the primary ballots of more than one party but is defeated in each primary, the majority argues, the candidate's name will not be on the general ballot even though he or she may have received, in the aggregate, the majority of the votes cast in the primaries.

The state has no interest, let alone a compelling interest, in ensuring that a candidate obtain office simply becaue he or she has won a large number of votes in primaries. Our electoral system requires a candidate both to gain a place on the ballot and to win the general election. Gaining substantial support in several primaries is no substitute for winning both a primary and a general election. A primary is an intra-party event, and is not meant to reflect, and does not reflect, the decision of the general electorate concerning who should hold a particular office. That decision is properly left to a general election.

In several decades of experience with MPN in New York, we are not aware of a single instance in which the far-fetched scenario described by the lower court has occurred. Preventing an event that is so unlikely that it has not occurred in several decades of experience with MPN hardly seems a compelling state interest meriting the intrusion into party autonomy represented by a ban on MPN.

B. No Ban on Multiple Party Nominations is Necessary in Order to Avoid Voter Confusion

The majority below argues that without a ban on MPN, voters would be confused by the presence of the same candidate on the ballot of more than one party. It would, the court says, be difficult for voters to distinguish between the parties.

During the past several decades, we have never experienced such confusion or difficulty among the voters of New York. To the contrary, MPN has helped voters understand more precisely the positions of the candidates for whom they have voted. The fact that Jacob Javits typically ran for the U.S. Senate as the Liberal Party, as well as the Republican Party, nominee, made it clear to voters that Javits was a liberal Republican. Similarly, the fact that Javits' successor, Alphonse D'Amato, ran as both a Conservative Party and Republican Party nominee made it clear to voters that D'Amato was a conservative Republican. And, as noted above, voters who wished to support D'Amato because of the more conservative elements of his platform could, and did, vote for him on the Conservative Party line rather than the Republican line, while voters who wished to support Javits because of the more liberal elements of his platform could, and did, vote for him on the Liberal Party line.

C. No Ban on Multiple Party Nominations is Necessary to Preserve the Integrity of the Election Process

The final argument of the majority below in support of the ban on MPN is that it is necessary to preserve the integrity of the election process, specifically, to prevent party "raiding," or the mischievous entry into a party's primary by voters supportive of another party, and to prevent the involuntary fusion of political parties.

No ban on MPN is necessary to accomplish these goals. Multiple party nominations, which have been permitted in New York for most of this century, have not threatened in any way the integrity of the election process. Instead, they have fostered

the stability of that system by permitting voters, political parties and candidates to participate in the election process in additional ways.

Whether or not MPN is allowed will have no effect on party raiding. States can prevent party raiding by restricting who can participate in primary elections. New York, for example, restricts party primaries to enrolled party members, *see* N.Y. Elec. Law §§ 1-104(9), 5-210(5)(f) (McKinney's 1978 & Supp. 1992), and permits only members who enrolled more than twenty-five days before a primary to vote in that primary. N.Y. Elec. Law § 5-210(3) (McKinney's 1978 & Supp. 1992).

Similarly, the concern of the majority below that MPN will result in involuntary fusion can be addressed without banning MPN, simply by requiring consent to the fusion strategy by those involved. In New York, for example, involuntary fusion is simply not a problem because New York election law requires consent from both the party and the candidate before a candidate can be a party's nominee. *See* N.Y. Election Law §§ 6-120(3), 6-146(1) (McKinney's 1978 & Supp. 1992). The National Socialist Party could not, therefore, nominate a major party candidate in order to defeat that candidate, since the candidate must consent to the nomination. In addition, parties cannot involuntarily fuse in New York, because they cannot be compelled to participate in MPN. Given the simple expedient of a state law requiring consent, there is absolutely no need to ban MPN in order to meet the concerns asserted by the majority.

D. No Ban on Multiple Party Nominations is Necessary to Preserve the Distinct Identity of Political Parties

Finally, the concurring opinion below argues that a ban on MPN furthers the compelling interest of maintaining the distinct identity of political parties. Again, long experience with MPN in New York has not led to the predicted evil.

The Liberal Party has been in existence since 1944, the Conservative Party since 1962. Throughout the existence of

both parties, MPN has been permitted, and both parties have engaged in MPN on a regular basis. Nonetheless, neither party has lost its distinct identity.

Moreover, it is our view, based on our experiences in a state that permits MPN, that if a political party so mimics another that it loses its distinctiveness, that party will fare poorly in the political process. Voters, funders and those who donate their time to campaigns will not support a party that is indistinguishable from another, and candidates will not seek its nomination. In other words, the political process itself will force parties to remain sufficiently distinct from one another to attract support. There is simply no need for the state to mandate a particular quantum of difference between political parties.

Furthermore, the state has no business mandating that political parties be distinct from one another. If any party wishes to adopt a platform only slightly different from, or even identical to, that of another party, or run a slate of candidates only slightly different from, or even identical to, that of another party, the state should not be permitted to prevent it from doing so. The state surely could not scrutinize the platforms of the Republican and Democratic Parties to ensure that the two parties disagree about a sufficient number of issues.

In short, a ban on MPN is not necessary to maintain the distinctiveness of political parties. Moreover, preserving the distinctiveness of political parties is not even a legitimate state interest, let alone a compelling interest.

CONCLUSION

For the reasons contained herein, the Conservative and Liberal Parties urge this Court to grant certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Respondents.

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Interests of Amicus Curiae

Public Citizen, a nationwide consumer advocacy organization with over 140,000 members, over 2,000 of whom are residents of Wisconsin, files this brief because, if allowed to stand, the ruling below will adversely affect the ability of our members to support minor party candidates for public office.[1] Like the rest of the American electorate, many of Public Citizen's members are either independent voters or voters who, although registered as Democrats or Republicans, at times prefer to support minor

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[1] Public Citizen files this brief with the consent of the parties. Letters of consent have been lodged with the Clerk.

parties. The decision under review sustained the constitutionality of a Wisconsin statute that prohibits multi-party nominations ("MPNs"), *i.e.*, the nomination of a single candidate, in the same election and for the same office, by more than one party, and thereby restricts the ability of minor parties to be full participants in the political process.

The court below upheld the MPN ban because it viewed the state's interest in maintaining the stability of the political system to be more compelling than the interests of minor parties to choose their own standard-bearers. We agree with the petitioners that this case warrants review because the state has no valid interest in dictating to a political party what candidates it can and cannot nominate. We file this brief, however, because the petition focuses principally on the *party*'s interest in having the MPN ban overturned. Our concern is with the detrimental impact that MPN bans have on *voter* choice, a perspective not fully developed by petitioners.

As we show, MPN bans often force voters into a Hobson's choice: they can either "waste" their vote by supporting a *party* that stands for principles with which they agree but whose candidate has no realistic prospect of winning, or they can vote for an electable major party candidate even though they do not support the party's platform. Imposition of this choice violates voters' First Amendment associational interests, as well as those of the minor parties they would support but for the MPN ban. MPN bans cannot be justified on the grounds that they serve compelling state interests; as Circuit Judges Ripple, Posner, and Easterbrook pointed out in their dissent from the denial of rehearing *en banc*, the major parties erected MPN bans for one purpose -- to preserve their positions of dominance, not to serve the public. At a time when increasing numbers of voters are dissatisfied with existing institutions, restraints on voter choice should not be sustained on the basis of the parochial interests of the major parties. For this reason as well, this case merits plenary review.

Statement of Facts

As is recounted fully in the petition, this case involves a First

Amendment challenge by the Wisconsin Labor Farm Party and two of its members to Wisconsin's ban on multiple-party nominations. The Labor Farm Party brought this action after the State Board of Elections refused to permit Labor Farm to place Douglas LaFollette's name on the Party's primary ballot for the office of Secretary of State, with his express consent, solely because Mr. LaFollette was already seeking the Democratic Party nomination to the same office.

Both lower courts rejected Labor Farm's First Amendment challenge, reasoning that it remained free to support Mr. LaFollette (even though it was forbidden from having him as its standard-bearer) or to nominate another candidate of its choice. The courts also reviewed the state interests asserted in defense of the MPN ban and found them compelling. Among others, the courts found that the MPN ban furthers the valid state goals of 1) maintaining the stability of the political system by ensuring that the general election winner captured a majority or plurality of the votes and 2) encouraging the parties to preserve distinct ideologies and platforms.

REASONS FOR GRANTING THE WRIT

We agree with petitioners that the ruling below warrants review because the core issue presented -- whether a state can legitimately forbid a political party from nominating the candidate of its choice simply because that candidate is also the choice of another party -- is a substantial one with nation-wide implications. We also agree with petitioners that the MPN ban has a disproportionate and highly adverse impact on minor parties. The inability to nominate a candidate who is also nominated by a major party substantially hinders the ability of minor parties to form alliances and coalitions with major parties. In states where MPN is permitted, if a candidate who is supported by both a major and minor party prevails because of the votes cast on the minor party line, an important message is sent to both the candidate and to the parties -- a message that could well influence the major party's platform, the candidate's performance in office, and give rise to useful and mutually beneficial political alliances between

major and minor parties. *See* Pet. App. C., at 22a-23a.[2]

MPN bans prevent voters from sending that message, and hence they violate voters' First Amendment associational rights. This Court has long made clear that state election laws that unduly restrict a voter's freedom of choice may impinge on freedom of association so as to run afoul of the First and Fourteenth Amendments. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). This is such a case. In states that prohibit MPN like Wisconsin, voters who do not subscribe to the platform or ideology of one of the two major parties will be forced to sacrifice their associational interests every time they vote, unless they opt to waste their vote on an unelectable candidate. They can either vote for the *candidate* of their choice and be compelled to associate with a party they do not support, or they can associate with the minor party of their choice by wasting their vote on a candidate who is almost certain not to be elected. MPN bans thus forbid voters from doing what they want, what the minor party wants, and what the candidate is perfectly willing to accept: namely, vote for the candidate of their choice on the party line of their choice. This Hobson's choice violates the settled principle that the state may not require its citizens to forego the exercise of one fundamental right to enjoy another, absent the most compelling justification, which is lacking here. *Elrod v. Burns*, 427 U.S. 347 (1976); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *see also United States v. Roberts*, 468 U.S. 609, 623 (1984).

The gravity of this problem is underscored by the fact that, although the MPN ban is designed to preserve the dominance of

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[2] As the *amicus* brief submitted by the New York Conservative and Liberal Parties makes clear, voters want this choice. For instance, a longstanding Democratic voter who is disenchanted with the party's nominee might not want to vote for a candidate running on the Republican ticket. But that voter might well support the same candidate running on a third-party slate. This scenario is played out all the time in New York, where voters can indicate their disagreement with the major parties by voting for the candidate they prefer on the Conservative or Liberal line, without wasting their vote. Because of the influence of these minor parties, the major parties and their candidates must be vigilant to forge coalitions with the minor parties and to shape their platforms in a way that accommodates the interests of these parties.

the two major parties, we are now entering an era in which the American electorate is moving away from party loyalty. In fact, independent voters are fast becoming the major segment of the voting public. N. Nie, S. Verba & J. Petrocik, THE CHANGING AMERICAN VOTER 49 (Harv. Univ. Press 1976)("Nie"); *see also* L. Mulcahy & R. Katz, AMERICA VOTES 46 (Prentice-Hall 1976) ("Mulcahy"). For a variety of reasons, over the past two decades, the ranks of independent voters have steadily grown to the point where now 38% to 40% of the voters across the country term themselves "independent." Nie at 49; Mulcahy at 46. That figure equals the number of voters who call themselves "Democrats" and far outstrips the number who consider themselves "Republicans." *Id.* For younger voters, the movement away from the major parties is even more pronounced: 45% of the voters nationwide under 30 years of age are independents. Nie at 64; Mulcahy at 46.

Two characteristics mark this segment of the electorate. First, the attitudes of contemporary voters indicate that they are more politically sophisticated than the independent voters of earlier years. "They reject the party system consciously as a response to political events, while remaining interested and continuing to vote . . . [T]he new independence has emerged among the young, well-educated voters largely as a response to issues." Mulcahy at 48; *see* Nie at 94-95. Second, because of this sophistication, and because voters' political attitudes toward the parties are adopted early in life and become more fixed over time, these voters are unlikely to surrender their independence for partisanship. Mulcahy at 48; Nie at 94-95. Thus, the voters most directly affected by the MPN ban -- those most likely to consider supporting minor parties while not wanting to "waste" their votes -- represent a large, distinct group likely to have a continuing influence on the shape of American politics. It is this group that is especially penalized by the MPN ban at issue here.

Because of the adverse impact MPN bans have on the associational rights of minor parties and on the voters who would be willing to support minor parties in the absence of such bans, this Court's jurisprudence makes it clear that the ban may be sustained if, but only if, the state can affirmatively establish that the

ban is narrowly tailored to serve a compelling interest. *Elrod v. Burns*, 427 U.S. at 362; *Kusper v. Pontikes*, 414 U.S. at 58. Labor Farm's petition addresses the reasons why there is no nexus between the ban and the interests asserted in its defense. But, because two of the state's arguments are couched in voter-protection terms, we address them briefly here.

First, a ban on MPN does nothing to further the principal interest asserted by the state and relied on by the courts below, namely, protecting voters by ensuring the stability of the political process. MPN bans do this, the argument goes, by seeing to it that general election winners have the support of a majority or at least a plurality of the voters. *See* Pet. App. A, at 5a; Pet. App. B., at 15a. We do not dispute the legitimacy of a state's interest in avoiding factionalism, but that interest is not served by a ban on MPN. In fact, MPN bans *encourage* factionalism, since minor parties have no incentive to forge coalitions and alliances with major parties through joint support of a common standard-bearer. Rather, with a MPN ban in force, minor parties have no choice but to place their own candidates on the ballot and to try to drain as many votes as possible away from their major party rivals, which lessens the likelihood that any one candidate will capture a majority.

Second, there is no basis for the assertion that MPN bans help sharpen the political messages delivered to the voters. This argument was embraced in Judge Fairchild's concurrence below, which argues that a state may legitimately seek to "maintain[] the distinct identity of the parties," and that MPN threatens that interest because "the distinct identities of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party." Pet. App. A, at 10a. There are two problems with this argument. To begin with, it rests on the flawed premise that MPN bans somehow encourage parties to keep their ideologies and platforms distinct and well-defined. That is hardly the case. With the absence of serious competition from minor parties, the major parties are free to keep their goals and principles vague and indeterminate in order to attract the widest possible public support. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 70 (1976) (*per curiam*); *Rosario v. Rockefeller*, 410 U.S. 752, 769-70 (1973); *Williams v. Rhodes*, 393 U.S. 23, 33 (1968). If party

"distinctness" is a laudable goal, it is not being served by MPN bans.

In fact, it is likely that lifting MPN bans would sharpen the parties' political messages. With MPN, the *parties* as well as the candidates will be in competition for voters, and hence will have to hone their platforms and ideologies. If both a major and minor party believe that the same person is the best candidate and form an alliance to get that candidate elected, that alliance speaks volumes to voters; it is also vitally important to the candidate and the parties to know which party platform is favored by the voters. That information would, in turn, be used by parties to refine and fine-tune their message to enlist even greater public support for their cause.

As is evident, the issues raised by the petition strike at the heart of the American political process. This case does not simply concern the ability of minor parties to be full participants in the electoral process; it also involves the right of voters to choose both the candidates and the party platforms that best reflect their views on the vital political issues of the day. Nor does the decision below affect only Wisconsin. Rather, unless reversed by this Court, the ruling below etches the Wisconsin statute -- and the thirty or forty more like it -- in stone, because the dominant parties that control the statehouses are the *beneficiaries* of the ruling, and will certainly not act to overturn it. Similarly, the ruling below casts a shadow in those states that currently permit MPN, because it tells the dominant parties that it is perfectly permissible to erect MPN bans and thereby weaken their minor party opponents. For these reasons, this case is simply too important to go unreviewed.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted, and this case should be set down for briefing and argument.

Respectfully submitted,

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(4)

No. 91-1589

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GEORGE SWAMP, JOHN HENDRICK, and LABOR-FARM PARTY/PARTIDO LABORISTA-AGRARIO,

Petitioners,

v.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, PETER R. DOHR and THOMAS P. GODAR, MARK E. SOSTARICH, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are Wisconsin's statutes which restrict a candidate from simultaneously appearing on the ballot as the candidate of more than one political party or as the candidate of a party and as an independent candidate unconstitutional under the First and Fourteenth Amendments?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, the State of Wisconsin Elections Board and its Executive Director, respectfully request this Court to deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit. The court's opinion is reproduced in the appendix to the petition (App. A at 1a).

The petitioners' Statement of the Case is accurate.

REASONS FOR DENYING THE WRIT

I. THE CHALLENGED STATUTES RESTRICT A CANDIDATE TO ONE PARTY AND ONE OFFICE ON A BALLOT. ANY EFFECT ON A PARTY'S ASSOCIATIONAL RIGHTS IS INCIDENTAL AND MINIMAL.

The petitioners persist in mis-characterizing the Wisconsin law. Sections 8.03(1) and 8.15(7), Wis. Stats., impose restrictions on candidates. Section 8.15(7), Wis. Stats., prohibits a candidate from running in more than one party primary at the same time or from running as an independent candidate and the candidate of a recognized political party at the same election. Section 8.03, Wis. Stats., provides that if a person is nominated to the same office by more than one party or nominated for more than one office, the candidate must choose which party or which office to accept. The petitioners' statement that "Wisconsin's MPN-ban tells Labor Farm whom it can nominate" (Petition at 9) is disingenuous at best. The laws do not prohibit any party from choosing a candidate; they simply say that if a candidate has already chosen another slot on the ballot, he or she cannot appear on the ballot again. That is true whether the candidate wishes to appear as the candidate of two or more parties or whether the candidate wishes to run as both a party candidate and an independent candidate.

Douglas La Follette filed his own nomination papers as a candidate for Secretary of State in the Democratic Primary (R. 6, Exhibit C; R. 19:1, para. 2). He could have chosen to run in the Labor-Farm Primary or the Republican Primary. The law honors the candidate's selection of a party and only prohibits a candidate's

"access" to more than one position on the ballot. The law does not prohibit a party from soliciting another party's candidate to run in the first party's primary. In Wisconsin, the candidate picks the party; the party does not pick the candidate. The Wisconsin law simply says that if the Labor-Farm Party cannot convince a candidate to run in its column, it cannot claim that candidate as its candidate. The choice, however, does not rest with the Democratic Party, the Republican Party or the Labor-Farm Party. The choice rests with the candidate. The law is only slightly different from the usual laws regulating voting and voters' party affiliation, *e.g.*, if a voter chooses to vote in the Democratic primary he or she will not be able to vote, in that election, in another party's primary. State law restricts the candidate and the voter to one choice. It does not at all restrict the exercise of that choice.

The right to vote is fundamental. *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). There is no parallel right to be a candidate. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). This Court has recognized that "voters can assert their preferences only through candidates or parties or both." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Despite this recognition the Court consistently has held that the status of candidacy does not invoke a rigorous standard of review. *Bullock*, 405 U.S at 143.

The Wisconsin laws, on their face and as applied, restrict a candidate's choice. That is bound to have an effect on any party the candidate does not choose. As noted earlier, however, that is no different than the effect on candidates and parties of state laws restricting voters to one vote or one party.

In *Storer v. Brown*, 415 U.S. 724 (1974), this Court considered California statutes which required an independent candidate to: (1) Be unaffiliated with a qualified political party for a period of one year prior to the

next primary election; (2) File nominating petitions signed by qualified voters not less than five percent nor greater than six percent of the votes cast in the last general election; (3) Obtain all signatures during a twenty-four-day period following the primary election; and (4) Use signatures from only those who had not voted in the primary election. *Storer*, 415 U.S at 726-27. The Court upheld that portion of the statute which covered candidate affiliation but remanded the case for a closer look at the other provisions. The statutory scheme upheld in *Storer* included a ban on multiple candidate nominations. *Storer*, 415 U.S. at 734, 749. The Court noted that California forbid the cross-filing practices "after long experience with permitting candidates to run in the primaries of more than one party." *Id.*

Earlier, the Court upheld without opinion an Ohio statute which barred the primary candidacy of anyone who had even voted in a different party's primary in the last four years. *Lippitt v. Cipollone*, 404 U.S. 1032 (1972), *aff'g mem.*, 337 F. Supp. 1405 (N.D. Ohio 1971).

The Court relied on its decision in *Storer* in both *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) and *Eu v. San Francisco Cty. Democratic Cent. Com.*, 489 U.S. 214 (1989), the two cases upon which the petitioners attempt to build their case. In *Tashjian*, the Court noted that in *Storer*, "[w]e upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election." *Tashjian*, 479 U.S. at 223. The Court was hardly suggesting that it was ready to decide *Storer* differently; on the contrary, it was reaffirming the validity of that decision.

The statute challenged in *Tashjian* prohibited independents from voting in the Republican primary even

though the Republican Party wished to allow those independent voters to participate in their nominating process. The law, therefore, directly infringed on a voter's right to associate with the political party of his or her choice and defeated the party's attempt to broaden its base of public participation. The Court in *Tashjian* did not suggest that voters should be allowed to vote in the primaries of two parties; the Court merely held that the state could not erect a barrier to a voter's choice of party.

Wisconsin law imposes no such barrier to a candidate's choice of party. That choice is solely the candidate's choice. The challenged statutes simply limit a candidate to one choice, one "vote." The associational right at stake here, therefore, is the right of the Labor-Farm Party to associate on a ballot with a candidate who has first chosen to associate with another party on that ballot.

If the Constitution requires that petitioners be allowed to have a candidate on their ballot who has already decided to be on another party's ballot, the Equal Protection Clause of that same Constitution would require the same conclusion for other parties which were similarly situated. Therefore, if Wisconsin or any other state had three minor parties as well as the two major parties on a ballot, at least all of the minor parties, and possibly the major parties, would have the constitutional right to have the same candidate run for the same office. Wisconsin's law does not "limit the field of candidates from which voters might choose." *Anderson*, 460 U.S. at 786, *quoting*, *Bullock*, 405 U.S. at 143; it assures that the field of candidates will not be limited to one very popular candidate purporting to represent all political parties.

The petitioners propose to strengthen their political party by limiting the voters' choice of candidates. The Constitution does not require the state to adopt that view of desirable electoral policy. The Wisconsin laws restrict a party's choice of a candidate only to the extent that that

party is unable to convince the candidate to be its candidate. The ability to convince candidates to be a party's candidate and the concomitant ability to convince voters to vote for a party's candidate are the essence of politics. The Wisconsin laws have not stopped Wisconsin voters from electing third-party Governors and Senators. Indeed, the Progressive Party became a force in Wisconsin politics forty years after the statute's genesis in 1897.[1]

II. THE STATE'S INTERESTS ARE SUBSTANTIAL.

The cases upon which the petitioners rest their argument all involve a state's limiting a party's access to the ballot, *Anderson*, 460 U.S 780; *Norman v. Reed*, 112 S. Ct. 698 (1992); *Eu*, 489 U.S. 214, or a state limitation on who can vote in a party's primary. *Tashjian*, 479 U.S. 208. If the state law thwarts a party's access to the ballot the state must demonstrate a corresponding interest sufficiently weighty to justify the limitation. Any "severe" restriction on a new party's access to the ballot must be narrowly drawn to advance a state interest of compelling importance. *Norman*, 112 S. Ct. at 705.

As noted above, Wisconsin's laws do not restrict the party's access to the ballot. Wisconsin's laws are anything but restrictive. Wisconsin requires only 2,000 signatures

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[1]Philip F. La Follette was elected Governor as a Progressive in 1934. Orlando S. Loomis was elected Governor as a Progressive in 1942, having been elected Attorney General as a Progressive in 1936. Robert M. La Follette was elected to the United States Senate as a Progressive in 1934, and re-elected as a Progressive in 1940. The Progressives also elected a secretary of state (Theodore Damman, 1934), a lieutenant governor (Henry A. Gunderson, 1936) and a state treasurer (Solomon Levitan, 1936).

to put someone on the ballot in a primary for statewide office, sec. 8.15(6), Wis. Stats.; allows registration at the polls, sec. 6.55, Wis. Stats.; and does not require any party registration at all. Every recognized political party listed in the last gubernatorial election whose candidate for any statewide office received at least one percent of the total votes cast for that office has a separate primary ballot. Sec. 5.62(1)(b), Wis. Stats. The Court must look at the "totality" of the election laws when assessing the impact of one of those laws. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

The challenged statutes regulate not only multiple party nominations; they also prohibit someone who is running as an independent candidate from filing nomination papers as the candidate of a recognized political party; prohibit someone who is running as the candidate of a recognized political party from filing as an independent candidate, sec. 8.15(7), Wis. Stats.; and also prohibit someone from running for more than one office in the same election. Sec. 8.03(1), Wis. Stats. The Wisconsin statutes further the same state interests as the statutes upheld in *Storer*. In fact, Wisconsin's laws are less restrictive than the law upheld in *Storer*; they do not require a candidate to forsake party affiliation and do allow a candidate to change parties at any time. The declaration of candidacy, which can be filed even before nomination papers are filed, simply states that the signer is a candidate for a named office, that he or she meets, or will at the time he or she assumes office, applicable age, citizenship, residency or voting qualification requirements and that he or she will otherwise qualify for office if nominated and elected. Sec. 8.21, Wis. Stats.

Unlike the statutes in *Storer*, *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *Jenness v. Fortson*, 403 U.S. 431 (1971), Wisconsin's laws do not limit disaffiliation, do not preclude independent candidacies and do not preclude party switching. The only restriction is that a candidate

cannot be on the ballot more than once. Without the challenged laws any party could borrow a major party's candidate in an attempt to stay on the ballot, thereby defeating the state's "admittedly vital interests" including the "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion." *American Party of Texas v. White*, 415 U.S. 767, 782, n. 14 (1974).

Wisconsin's laws, like California's, seek "to have contending forces within the party employ the primary campaign and primary election to finally settle their differences." *Storer*, 415 U.S. at 735. The ballot, therefore, presents the voters "with understandable choices and the winner in the general election with sufficient support to govern effectively." *Id.* The Wisconsin law, like the laws upheld in *Storer*, further the state's compelling interest in the stability of its political system.

Wisconsin could adopt more onerous restrictions and still be well within constitutional parameters. Wisconsin allows party switching, including instantaneous party switching. It has no party registration requirement. It has no disaffiliation requirement. The Wisconsin statute accomplishes Wisconsin's compelling interests less restrictively than laws which impose party registration requirements, party affiliation requirements, or party disaffiliation bars to candidacy. All of those restrictions have been upheld by this Court. Wisconsin's law falls well within the constitutional parameters set by this Court.

The petitioners suggest that Wisconsin could avoid some of the evils it perceives in allowing a candidate to appear on the ballot more than once by less restrictive means (Petition at 12–13). Removing the ban against multiple candidacies and substituting the petitioners' proposed cures, however, would not accomplish all of the state's legitimate goals. For example, although involuntary nominations by extremist parties could be resolved by the

simple expedient of requiring candidate consent, candidate consent alone is not enough. A candidate running in two parties' primaries should have the consent of both parties. The state could hardly force a party to give its consent, however. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981); *Eu*, 489 U.S. 214. Presumably, if a candidate had a right to be on the ballot twice, he or she would also have the right to be on the ballot more than twice, that is, a candidate could be many parties' candidate. Wisconsin does not want to limit the field of candidates from which voters might choose. *Anderson*, 460 U.S. at 786; *Bullock*, 405 U.S. 134. It has a compelling interest in expanding the number of candidates on the ballot and a corresponding compelling interest in not restricting the field of candidates simply to foster a minor party's chance of electoral success.

III. THE LOWER COURTS CORRECTLY APPLIED WELL-SETTLED LAW. THE CASE IS NOT WORTHY OF REVIEW.

Restricting a candidate to one position on the ballot is hardly unusual and has never before been challenged as very restrictive. That is perhaps so because other, more restrictive statutes have been upheld by this Court. Wisconsin has an historical distrust of political parties; it was the first state to require that candidates be chosen in binding primaries. That distrust of political party power is reflected in the state's allowing candidates to choose the parties instead of the parties choosing the candidates. The court of appeals correctly concluded that the cases concerning a state's interference with a party's internal affairs are simply inapplicable. According to the petitioners, eight states either permit or do not ban multiple nominations by political parties (Petition at 3, n. 3). The other forty-two states, Wisconsin included, choose

different electoral systems. The First and Fourteenth Amendments certainly do not require that those forty-two states adopt an electoral system more to the petitioners liking.

The court of appeals correctly applied long-standing precedent and recent precedent. There is nothing in the case that would warrant the granting of the writ.

CONCLUSION

For these reasons, this Court should deny the writ.

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